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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMITTEE FOR A FAIR AND BALANCED
MAP, et al.,

Plaintiffs,

vs.

ILLINOIS STATE BOARD OF ELECTIONS,
et al.,

Defendants.

) Docket No. 11 C 5065

) Chicago, Illinois
) September 29, 2011
) 9:00 o'clock a.m.
)

TRANSCRIPT OF PROCEEDINGS - MOTION
BEFORE
THE HONORABLE JOHN DANIEL TINDER
THE HONORABLE ROBERT LOWELL MILLER, JR.
THE HONORABLE JOAN HUMPHREY LEFKOW

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09:11:10 1 (The following proceedings were had in open court:)

09:11:10 2 THE CLERK: 11 C 5065, Committee for Fair and
09:11:18 3 Balanced Map v. Illinois State Board of Elections.

09:11:22 4 MS. LIGHTFOOT: Good morning, your Honor; Lori
09:11:24 5 Lightfoot and Tom Panoff on behalf of the plaintiffs.

09:11:28 6 MR. BERGETZ: Good morning, your Honor; Carl Bergetz
09:11:30 7 and Brent Stratton on behalf of the State Board of Elections
09:11:34 8 and other defendants.

09:11:34 9 MR. PRENDERGAST: Good morning, your Honor; Richard
09:11:38 10 Prendergast on behalf of third parties.

09:11:38 11 MR. LAYDEN: Mike Layden also for third parties.

09:11:44 12 MR. KASPER: Michael Kasper, K-a-s-p-e-r, on behalf
09:11:44 13 of the state defendants.

09:11:44 14 JUDGE LEFKOW: All right. Lots of lawyers.

09:11:52 15 I welcome Judges Tinder and Miller to join the panel
09:11:54 16 today and talk about the discovery. It comes down mostly to
09:12:06 17 the issue of how far does immunity extend. We have read all
09:12:08 18 the materials and have an idea of where we want to go, but I
09:12:14 19 have a few questions for you, and then others may jump in.

09:12:18 20 As for the plaintiffs, what information do you need
09:12:20 21 that is not already available from public sources?

09:12:24 22 MS. LIGHTFOOT: Your Honor, we still as we sit here
09:12:26 23 today several months into this case have no idea of some basic
09:12:30 24 information. For example, we have no idea who actually
09:12:34 25 drafted any of the particular districts that are in the plan

09:12:38 1 that was signed into law earlier this year. We have no
09:12:42 2 information about what decisions were made as to how the lines
09:12:44 3 were drawn on any particular district. We have no specific
09:12:50 4 information as to what information was used as a source,
09:12:54 5 whether, for example, any racial bloc voting analysis was
09:13:00 6 done, whether or not there was any considerations with respect
09:13:02 7 to respecting communities of interest. Any of the basic
09:13:08 8 information, for example, that we have provided to the State
09:13:12 9 Board of Elections with respect to the alternative map which
09:13:14 10 we have tendered to the court back in early August, we have
09:13:18 11 none of that information with respect to how the
09:13:24 12 reapportionment plan for Congressional district was drawn. We
09:13:28 13 know nothing.

09:13:28 14 We are frankly -- we have a little bit of
09:13:32 15 information, but we have virtually nothing that would allow us
09:13:36 16 to do any kind of analysis with respect to intent. We have no
09:13:38 17 specific information regarding what was done in the
09:13:42 18 construction, for example, of Congressional District 4, the
09:13:46 19 so-called earmuff district. We have no specific information
09:13:50 20 from them because it's not publicly available about how
09:13:54 21 Districts 3 and 5 that abut the city for the earmuff district,
09:14:00 22 how those districts were changed and whether or not specific
09:14:02 23 populations moved into those districts; for example, whether
09:14:06 24 or not the Latino populations from those existing districts
09:14:10 25 pre -- of the pre-districting were carved out of those

09:14:14 1 districts and moved into that. That's information that we
09:14:16 2 have a little bit of analysis for, but we have nothing from
09:14:20 3 their side. And the concern, obviously, is we have challenged
09:14:24 4 this map as an unconstitutional racial and political
09:14:28 5 gerrymander. I think we are entitled to basic information
09:14:32 6 about how it was that the people who actually drew the map
09:14:36 7 made their decisions, who they were, how it was done, and none
09:14:40 8 of that information is available.

09:14:40 9 For example, if you have looked at our briefs, I
09:14:44 10 think we point out there were weeks of public hearings that
09:14:48 11 were held across the state ostensibly to talk about issues
09:14:54 12 related to redistricting. If you look at the transcripts from
09:14:56 13 those public hearings, by and large, the discussion was about
09:15:00 14 the state legislative map, very little commentary from any
09:15:04 15 direction with respect to the Congressional map. So those
09:15:08 16 publicly available transcripts frankly yield next to no
09:15:10 17 information.

09:15:12 18 We are told in our back and forth with counsel for
09:15:16 19 the respondents that, for example, no expert actually looked
09:15:20 20 at the map that was passed before it was passed. Now, we
09:15:26 21 obviously take them at their word, but no expert that they
09:15:30 22 have identified that is working on the state map -- for
09:15:32 23 example, expert Lickman (phonetic) and two others that were
09:15:36 24 identified -- frankly, it's impossible for us to believe that
09:15:40 25 no expert actually looked at, opined on, or helped with this

09:15:46 1 map.

09:15:46 2 Now, it could very well be that there was another
09:15:50 3 expert, and we suspect that there was, but it wasn't somebody
09:15:52 4 that was under the possession and control of the Springfield
09:15:56 5 democrats who controlled this map --

09:16:00 6 JUDGE TINDER: Well, you have a subpoena out, don't
09:16:02 7 you, to this DCCC organization --

09:16:04 8 MS. LIGHTFOOT: We do, your Honor.

09:16:06 9 JUDGE TINDER: -- who you suspect are, in your view,
09:16:08 10 the culprits here?

09:16:10 11 MS. LIGHTFOOT: What we believe, frankly, your Honor,
09:16:10 12 is this. We believe that part of the map was drawn by folks
09:16:16 13 in Springfield, but we also believe that another part of it,
09:16:18 14 and perhaps maybe the lion's share of that map, were drawn by
09:16:24 15 either the DCCC or their agents. There is another entity that
09:16:28 16 we have identified.

09:16:28 17 The difficulty is it's like a comedy sketch routine.
09:16:32 18 We have on the one hand the respondent saying, Well, this
09:16:36 19 information is available someplace else, go see the DCCC. We
09:16:38 20 get the DCCC on the other hand saying, This information is
09:16:42 21 available someplace else, go see the respondents. That issue
09:16:46 22 hopefully will get sorted out, we have a status on Monday in
09:16:50 23 the district court in Washington, D.C., that hopefully will
09:16:52 24 move that process along, but I don't think we are required to
09:16:56 25 choose one versus the other because the truth is, neither side

09:16:58 1 today has acknowledged much of anything about what their
09:17:04 2 specific role is in drawing this particular map. What they
09:17:08 3 have -- what the DCCC has done, frankly not unlike what has
09:17:12 4 happened here, is they have cloaked themselves in the First
09:17:14 5 Amendment privilege and this is a gross intrusion on their
09:17:18 6 proprietary information. We are still no further than we were
09:17:20 7 when we filed this lawsuit in finding out the particulars
09:17:24 8 about how it was drafted, who drafted it, and why certain
09:17:28 9 decisions were made. That's why we think that this issue
09:17:30 10 that's before the court today is so important. If there was
09:17:34 11 an alternative source, your Honor, believe me, we would be
09:17:36 12 seeking it, but the truth is --

09:17:38 13 JUDGE TINDER: I guess I have a lot of concern about
09:17:40 14 this why certain decisions were made. A legislator can have
09:17:48 15 in her mind that she is going to vote for certain legislation
09:17:52 16 to discriminate, right?

09:17:54 17 MS. LIGHTFOOT: Sure.

09:17:56 18 JUDGE TINDER: But you measure that by what the
09:17:58 19 result of the legislation is. Exploring the individual
09:18:02 20 thought process does not seem to be an appropriate -- in light
09:18:08 21 of things --

09:18:10 22 MS. LIGHTFOOT: Sure.

09:18:10 23 JUDGE TINDER: -- legislative immunity and other
09:18:12 24 concerns.

09:18:12 25 MS. LIGHTFOOT: Well, let me be clear about that.

09:18:14 1 One, we don't believe that this was a case that involves
09:18:16 2 legislative immunity because the respondents are not named
09:18:20 3 parties. We believe that the proper analysis --

09:18:24 4 JUDGE TINDER: Well, at least legislative privilege.

09:18:26 5 MS. LIGHTFOOT: Under privilege. And I think that's
09:18:28 6 an important distinction, your Honor, because as your Honor is
09:18:30 7 well aware, clearly if this were an instance where individual
09:18:34 8 member's liability was at stake, whether it be legislators or
09:18:38 9 their staff, then we would be having a very different
09:18:42 10 conversation, and frankly we might not even be having this
09:18:44 11 conversation, because the case law is clear about absolute
09:18:46 12 immunity in those circumstances.

09:18:46 13 What the respondents have done is essentially
09:18:48 14 conflate the broad legislative immunity case law and
09:18:54 15 protection it's afforded for litigants in a case versus the
09:18:58 16 privilege. But back to you --

09:19:00 17 JUDGE TINDER: I understand. I understand. But this
09:19:02 18 why is proven in the pudding, isn't it, in what they did,
09:19:08 19 that's how it's generally proven?

09:19:10 20 MS. LIGHTFOOT: I want to be clear that we are not
09:19:14 21 and we have no intention of asking individual legislators what
09:19:20 22 was in their head when they voted for the particular map.
09:19:22 23 That's frankly of no consequence --

09:19:24 24 JUDGE TINDER: It sure sounds like you're getting to
09:19:26 25 that, or what was in the staffer's head or what was in the

09:19:30 1 consultant's head when they did this or that. It sure sounds
09:19:34 2 like you're headed that way.

09:19:36 3 MS. LIGHTFOOT: Well, I think that under Shaw, we are
09:19:38 4 entitled in the context of an intentional discrimination
09:19:40 5 claim, which is what we have alleged in several of our counts
09:19:44 6 in the complaint, to understand what was the purpose in mind
09:19:50 7 in drafting the particular plan. And what we have sought is
09:19:54 8 specific documents that provide information, objective
09:19:58 9 information, about what facts they looked at, what data they
09:20:02 10 considered, and other things that I think are objective facts
09:20:06 11 that again don't get into the specific mindset of a particular
09:20:10 12 legislator or a staff person in order to help us prove up our
09:20:14 13 intent phase. That certainly is the distinction that we think
09:20:20 14 we were trying to draw with our subpoena, and we are happy to
09:20:22 15 clarify that.

09:20:24 16 But I think looking at those objective facts, the
09:20:26 17 what that went into the map, I think is something that we are
09:20:32 18 entitled to inquire about, and the qualified privilege, the
09:20:36 19 evidentiary privilege, allows us to make exactly that kind of
09:20:40 20 inquiry.

09:20:40 21 JUDGE LEFKOW: Okay. Let's take a break here. We
09:20:44 22 don't have a lot of time here, and nobody else had to speak.
09:20:48 23 So I am thinking let's hear from the defense, and then if you
09:20:52 24 have any more points you'd like to make, and then we will hear
09:20:56 25 from the defense and then the non-parties and third parties.

09:21:00 1 If some of you would like to be seated, you'd probably be more
09:21:02 2 comfortable.

09:21:04 3 MR. PRENDERGAST: Good morning, your Honor. Richard
09:21:06 4 Prendergast.

09:21:06 5 Your Honor, I was looking at the reply brief last
09:21:12 6 night and the pros as well as the allegations in the
09:21:20 7 complaint, and what is also lurking just below the surface of
09:21:22 8 this dark, bottomless pool is the role of the National
09:21:26 9 Democratic and Congressional Campaign Committee, which we call
09:21:30 10 the DCCC, who the Springfield democrats invited into the
09:21:34 11 process.

09:21:34 12 The DCCC has been subpoenaed for every single piece
09:21:38 13 of paper that they have having anything to do with this
09:21:42 14 process. They have maintained in their complaint and their
09:21:46 15 papers --

09:21:46 16 JUDGE TINDER: This isn't part of your motion to
09:21:48 17 quash, is it?

09:21:50 18 MR. PRENDERGAST: Well, I was just responding to
09:21:52 19 counsel.

09:21:54 20 JUDGE TINDER: I was kind of hoping we'd focus on the
09:21:56 21 issues that are before us.

09:22:00 22 MR. PRENDERGAST: Well, I think that they are
09:22:02 23 essentially cross-motions. I mean, the bases for the motion
09:22:04 24 to quash is very much the same. For example, one of the bases
09:22:06 25 for the motion to quash is that you have a legislative

09:22:12 1 privilege on the one hand and an argument on the other hand
09:22:16 2 that their hands are tied, and I am simply saying that in the
09:22:20 3 course -- in the complaint and in the papers they filed, they
09:22:24 4 make an allegation, a clear allegation, that this map was
09:22:26 5 drawn by the DCCC and the members of the Illinois
09:22:34 6 Congressional delegation. In fact, they have subpoenas
09:22:38 7 scheduled for the entire Illinois Congressional delegation
09:22:42 8 starting with yesterday, and I think Congressman Shimkus is
09:22:48 9 scheduled for today, and then it goes on through Saturday, the
09:22:52 10 15th of October.

09:22:52 11 So they scheduling depositions of Congresspeople who
09:22:56 12 they believe were involved in the -- they obviously believe
09:23:00 13 they were involved in drawing the map, they have the DCCC, we
09:23:04 14 have produced thousands of documents in response to the
09:23:06 15 Freedom of Information Act, there are hearing transcripts.

09:23:10 16 So to answer the question, there all kinds of sources
09:23:12 17 of information here that are available to them, on top of the
09:23:14 18 fact that these cases are, in the final analysis, driven by
09:23:18 19 expert testimony. And that expert testimony takes in the
09:23:20 20 data, and the experts take in the -- consider all the data
09:23:26 21 affecting where the lines were drawn, and they provide, based
09:23:30 22 upon the data that's publicly available, their opinions with
09:23:34 23 respect to whether or not the map was fair or not, whether it
09:23:36 24 satisfies the Section 2 of the Voting Rights Act of the
09:23:42 25 protection clause or any other legal requirement.

09:23:44 1 So to answer the question -- and it's a question
09:23:46 2 that's pertinent to our motion to quash, your Honor, because
09:23:50 3 part of our motion to quash rests on the fact that this isn't
09:23:54 4 the only place they have to go and you have this
09:23:56 5 long-established going back to English common law certainly
09:24:02 6 incorporated within the American system of jurisprudence since
09:24:08 7 the beginning of legislative immunity and legislative
09:24:10 8 privilege. And so that point, to the extent that they argue
09:24:16 9 the legislative privilege doesn't apply here because this
09:24:18 10 isn't a speech and debate clause issue, there are cases that
09:24:22 11 we have cited that make it clear that the speech and debate
09:24:24 12 clause and the common law privilege applies to state
09:24:32 13 legislators, that common law privilege applies to state
09:24:36 14 legislators and is coextensive with the speech and debate
09:24:40 15 clause as the cases have been cited in our brief.

09:24:42 16 So the privilege itself is an extraordinarily
09:24:44 17 important one. I mean, if you imagine, it's a separation of
09:24:48 18 powers issue. And not to be too dramatic about it, but it's
09:24:52 19 not uncommon for a legislature, Congress or a state
09:24:56 20 legislature, to take up a bill that reviews law that has been
09:25:00 21 found by a court decision, the outcome has been determined by
09:25:06 22 a court decision, and the legislature wants to change it.

09:25:10 23 No one would even envision the possibility that a
09:25:14 24 senate committee could subpoena your law clerk or your papers
09:25:18 25 or inquire into your intent and motivation. In fact, there is

09:25:22 1 no case cited and there is no case that we have found where a
09:25:26 2 court has upheld -- either under a qualified privilege or an
09:25:30 3 absolute privilege has upheld the right of a party to inquire
09:25:34 4 into the motivations or intent of a legislator in the course
09:25:38 5 of preparing or in the course of deliberating or voting on a
09:25:42 6 bill.

09:25:44 7 And as far as the -- -

09:25:44 8 JUDGE TINDER: So how would that apply to information
09:25:48 9 coming in to the legislature, data that it receives, and on
09:25:52 10 the other end information that goes out, public statements
09:25:56 11 made, meetings with those who are not part of the legislative
09:26:00 12 process? How would it apply on both ends of the information?

09:26:06 13 I understand what you are saying about the kind of
09:26:08 14 internal workings where the legislators work with staff where
09:26:12 15 there are those deliberative things that legislators do. But
09:26:18 16 in the data coming in and the information going out, how does
09:26:22 17 it apply there?

09:26:22 18 MR. PRENDERGAST: It's part of the deliberative
09:26:24 19 process. There is substantial case law upholding that view,
09:26:28 20 and for a good reason.

09:26:30 21 If you take a look at the opening page or two of
09:26:32 22 their reply brief, you would think that this was some kind of
09:26:36 23 a Draconian unusual process by which this legislation was
09:26:40 24 passed. The fact of the matter -- you know the old sausage in
09:26:44 25 legislation bromide. The fact of the matter is that it's very

09:26:48 1 common in Springfield and in other state legislatures and in
09:26:52 2 Congress for a bill to be worked on by interest groups,
09:26:56 3 lobbyists, sponsors, all working together. It goes to the
09:27:00 4 rules committee, the rules committee without a hearing sends
09:27:02 5 it to a substantive committee. The substantive committee,
09:27:06 6 often without much of a hearing, sends it to the floor. And
09:27:10 7 most of the time, with far less debate than this bill got, the
09:27:14 8 bill passes. The description that they have on the first page
09:27:16 9 or two of their reply brief is a description of the
09:27:20 10 legislative process generally.

09:27:22 11 Now, this is not a situation where everybody was kept
09:27:24 12 in the dark. There was a lot of public hearing -- there were
09:27:28 13 a lot of public hearings, we have turned over thousands of
09:27:30 14 documents to them to the extent that the DCCC was the crafter
09:27:34 15 of this, they have them under subpoena, they have all the
09:27:38 16 Congresspersons under subpoena, they do not need to violate or
09:27:44 17 ask this court to violate or take exception to an
09:27:46 18 extraordinarily important privilege in immunity that has
09:27:52 19 existed in common law and throughout the United States
09:27:56 20 history.

09:27:56 21 JUDGE MILLER: When you say you "turned over
09:27:58 22 thousands of documents," what sorts of documents do those
09:28:00 23 consist of?

09:28:02 24 MR. PRENDERGAST: They consist of hearing
09:28:02 25 transcripts, they consist of reports, they consist of --

09:28:08 1 JUDGE MILLER: What kind of reports?

09:28:10 2 MR. PRENDERGAST: Well, reports concerning the --
09:28:12 3 what the whole process -- there were like 20 hearings around
09:28:18 4 the state. Every one of those hearings involved both the
09:28:22 5 state map and Congressional map. There were reports relating
09:28:24 6 to those. There were hearing transcripts themselves. I mean,
09:28:28 7 I don't have, your Honor, a list of all the documents.

09:28:30 8 JUDGE MILLER: No, I'm not -- I'm looking for a
09:28:32 9 genre.

09:28:34 10 MR. PRENDERGAST: It's clearly in the thousands. And
09:28:36 11 when you combine that with information that they are going to
09:28:40 12 seek -- are seeking from Congresspersons and other third
09:28:42 13 parties and you combine that with the fact that this is an
09:28:46 14 expert-driven, data-driven process, and you combine that with
09:28:50 15 the fact that there is no case that has ever allowed anybody
09:28:54 16 to ask what's the motivation or intent of a Congressperson or
09:28:58 17 a legislator in passing a bill, there is nothing here that
09:29:00 18 warrants exception to the legislative privilege.

09:29:04 19 JUDGE MILLER: Just to finish my question, everything
09:29:06 20 you have given them so far, these thousands of pages, are all
09:29:10 21 public records; is that what you have described?

09:29:12 22 MR. PRENDERGAST: I think they are largely public
09:29:14 23 records. I don't -- I think they are publicly available under
09:29:18 24 the Freedom of Information Act. I mean, I don't think you can
09:29:20 25 just go find them in the archives. But they pursued every way

09:29:26 1 to go after information. The Freedom of Information Act
09:29:30 2 inquiry was made, I don't know, five or six weeks ago, and it
09:29:34 3 was responded to.

09:29:36 4 So, you know, publicly available, yes, if you follow
09:29:38 5 the FOIA process, which they followed and which we responded
09:29:44 6 to.

09:29:44 7 JUDGE LEFKOW: It seems to me that the issue is
09:29:48 8 whether the common law legislative immunity absolutely shields
09:29:54 9 the non-party lawmakers from state lawmakers in providing
09:30:02 10 evidence in a lawsuit. I mean, they are not parties to the
09:30:04 11 lawsuit, and usually immunity is cast in terms of you don't
09:30:08 12 have to appear as a defendant in a lawsuit.

09:30:12 13 MR. PRENDERGAST: Your Honor, one of the cases we
09:30:14 14 cite is a D. C. Circuit decision, 1988. It's Minpeco,
09:30:20 15 M-i-n-p-e-c-o, v. Conticommodity Services, 844 F.2d 856, a
09:30:30 16 subpoena to non-party subpoena and staff protected by absolute
09:30:34 17 legislative privilege. That case recognized or held the very
09:30:44 18 point that you're referring to.

09:30:46 19 JUDGE LEFKOW: Okay.

09:30:46 20 MR. PRENDERGAST: I think that's also true of the
09:30:48 21 EEOC v. Washington Suburban, which is a Fourth Circuit
09:30:52 22 decision. And I think we had cited one other case as well.
09:30:56 23 It's at page 12 of our position to the motion to compel. I
09:31:04 24 think that's pretty well settled.

09:31:08 25 And it also addresses the issue of whether a

09:31:12 1 non-party -- if there is any distinction between a party and
09:31:14 2 non-party. This court has decided cases on that subject, and
09:31:20 3 they come back and say, Well, those are party cases. Minpeco
09:31:28 4 is not, I think -- Minpeco is not a party case.

09:31:28 5 JUDGE LEFKOW: But those are decided under the speech
09:31:30 6 and debate clause.

09:31:32 7 MR. PRENDERGAST: That's true.

09:31:34 8 MS. LIGHTFOOT: Yes.

09:31:34 9 MR. PRENDERGAST: But what the cases that we have
09:31:36 10 cited have indicated is that while the speech and debate
09:31:40 11 clause applies to Congress, the common law immunity applies to
09:31:44 12 state legislators and it's coextensive with the speech and
09:31:48 13 debate clause.

09:31:48 14 JUDGE LEFKOW: Maybe they are and maybe they are not.
09:31:50 15 Okay. All right.

09:31:52 16 MS. LIGHTFOOT: Your Honor, may I?

09:31:54 17 JUDGE LEFKOW: Does anyone for the defense want to
09:31:56 18 add to this?

09:32:04 19 MR. BERGETZ: No, your Honor.

09:32:04 20 MS. LIGHTFOOT: May I respond, your Honor.

09:32:04 21 JUDGE LEFKOW: Yes.

09:32:04 22 MS. LIGHTFOOT: There are a number of points that
09:32:06 23 need clarification. Judge asked, What specific documents have
09:32:10 24 the state provided when we talked about the authentication of
09:32:10 25 transcripts. I go back to the point that I made earlier, your

09:32:14 1 Honor. Yes, those transcripts were provided. Frankly, we had
09:32:16 2 them already. But those are transcripts for public hearings
09:32:20 3 in which no member of the public was allowed to ask any panel
09:32:24 4 member a single question and which, for the most part, there
09:32:26 5 was no reference whatsoever to any Congressional plan. And I
09:32:32 6 think an important point for this court to consider is that
09:32:34 7 during the course of those public hearings, there was no
09:32:38 8 Congressional plan that had been put forward to the public.

09:32:42 9 We emphasized in our papers the fact that the first
09:32:46 10 time that any member of the public had an opportunity to see
09:32:48 11 the actual Congressional -- a version of the actual
09:32:52 12 Congressional plan that subsequently was passed was on the
09:32:56 13 early-morning hours of the Friday of Memorial weekend. There
09:33:00 14 was no public hearing that was held on it. Unlike what
09:33:02 15 happened with the state map, which was subject to public
09:33:06 16 hearings after it was released. Despite the promises that
09:33:10 17 that would happen with the Congressional map, it did not
09:33:12 18 happen.

09:33:14 19 So the transcripts that Mr. Prendergast has talked
09:33:18 20 about, the thousands of pages that he produced, are frankly an
09:33:20 21 empty set because they don't contain any discussion of the
09:33:24 22 actual map that was passed. What they contain is commentary
09:33:28 23 from various citizens groups about what they would like to see
09:33:32 24 in a particular map, but there is no back and forth of
09:33:36 25 colloquy between the members of the redistricting committees

09:33:38 1 and the public which would identify specific parts of an
09:33:44 2 actual plan that would have been passed.

09:33:46 3 So, yes, they are available, yes, they were produced,
09:33:48 4 we sought them through FOIA, and we appreciate the production,
09:33:52 5 but they are effectively useless in providing any information
09:33:58 6 with respect to the basic facts of what was done, what were
09:34:02 7 the data inputs into the plan that was eventually passed.
09:34:06 8 There is nothing in those transcripts that bears any evidence
09:34:08 9 about that.

09:34:10 10 JUDGE MILLER: Can I ask you a follow-up on one thing
09:34:12 11 that Mr. Prendergast said --

09:34:14 12 MS. LIGHTFOOT: Yes, your Honor.

09:34:16 13 JUDGE MILLER: -- about the cases of this sort
09:34:16 14 usually being decided on the basis of expert testimony. And
09:34:20 15 the cases that I have read seem to be primarily expert
09:34:24 16 testimony based on publicly-available information.

09:34:28 17 Has nobody thought of this before? Is there
09:34:30 18 something unique about this case that gives rise to a greater
09:34:32 19 need for additional evidence?

09:34:34 20 MS. LIGHTFOOT: No, I think the cases actually end up
09:34:38 21 doing both. They end up certainly with a lot of expert
09:34:44 22 testimony about the viability of maps, the viability of
09:34:46 23 particular districts, how lines are drawn, whether or not
09:34:50 24 there is racial bloc voting. All that information certainly
09:34:52 25 plays out, but it's usually also in the context of actually

09:34:54 1 receiving information from the other side about how it was
09:34:58 2 that they went about constructing their map, the data that
09:35:00 3 they used, expert testimony that was used in constructing the
09:35:04 4 map, how particular lines were drawn. And in many instances,
09:35:08 5 for example, the actual people who drew the lines end up
09:35:12 6 providing testimony.

09:35:12 7 All we're asking for, your Honor, under the qualified
09:35:16 8 privilege, which does apply in this case, and I submit doesn't
09:35:22 9 keep the legislative immunity from suit and liability is an
09:35:24 10 absolute misnomer in this case. What we are asking for is the
09:35:28 11 basic information about how the map was drawn, what were the
09:35:32 12 data points that were used, what were the objective
09:35:36 13 considerations that were used. That is information that I
09:35:40 14 think we are entitled to. We do not have it, we sought it
09:35:42 15 from a number of different instances, and we still stand here
09:35:46 16 today at the end of September, several months into having
09:35:48 17 filed our lawsuit, several months into having attempted on a
09:35:52 18 number of different fronts to be sure to obtain that
09:35:56 19 information, and we still don't have it.

09:35:56 20 The cases that they have cited which purport to apply
09:36:02 21 this blanket absolute legislative immunity in the context of
09:36:06 22 either city council members or state legislatures, every
09:36:10 23 single one of those cases can be tied to either the speech and
09:36:12 24 debate clause itself because they are federal legislatures or
09:36:16 25 because the particular state constitution at issue or in the

09:36:22 1 instance of the couple D.C. circuit cases -- D.C. cases that
09:36:24 2 they cited, the D.C. charter actually adopts wholesale the
09:36:30 3 speech and debate clause there.

09:36:32 4 JUDGE TINDER: Are you saying there is no federal
09:36:34 5 common law of legislative immunity or legislative privilege?

09:36:38 6 MS. LIGHTFOOT: No, I'm saying in fact there is a
09:36:40 7 common law, a federal common law of legislative immunity and
09:36:42 8 privilege.

09:36:42 9 What we are suggesting, your Honor, and consistent
09:36:44 10 with the Irvin case that we cited, the Pataki case that we
09:36:48 11 cited, the Rodriguez case, in the instance where a third party
09:36:52 12 is not a named defendant in a suit, that the proper analysis
09:36:56 13 is the balancing test that courts all over the country have
09:37:00 14 used in weighing what the interests are in short strokes, what
09:37:06 15 the interests are at stake in the underlying suit, whether
09:37:08 16 there is an opportunity and an obligation to vindicate an
09:37:12 17 important federal interest in right such as there is here in
09:37:16 18 the Voting Rights Act and the other Constitutional provisions
09:37:18 19 that we have cited versus whether that's going to have a
09:37:20 20 chilling effect or undue intrusion on the part of the
09:37:24 21 legislature.

09:37:24 22 And the cases that we believe are more important in
09:37:26 23 terms of their facts and more consistent with the facts in
09:37:30 24 this case have come down universally to say it's a qualified
09:37:34 25 privilege, not a blanket absolute immunity, and that that

09:37:38 1 privilege must give way when there is important and federal
09:37:42 2 interest at stake such as vindicating the rights of the Voting
09:37:46 3 Rights Act. We think that those are the line of cases that
09:37:48 4 are most apt in this circumstance again. We cited in our
09:37:52 5 brief Irvin, Pataki, Rodriguez, and a number of others. And
09:37:56 6 when that balancing is done here, and that's -- unfortunately,
09:38:00 7 that is not an issue that the respondents have even addressed
09:38:02 8 because they believe that they are entitled to cloak
09:38:04 9 themselves in absolute immunity.

09:38:06 10 But when that balancing is done, we believe that in
09:38:08 11 this instance, there can be crafted a narrow order that
09:38:14 12 requires the respondents to provide the various data inputs
09:38:18 13 that we have sought through our subpoena, and we think that's
09:38:22 14 appropriate.

09:38:22 15 JUDGE TINDER: If your subpoenas were limited to
09:38:26 16 data, I think it would be a much simpler project for us to
09:38:30 17 address. I think your subpoenas are vastly broader than
09:38:34 18 simply seeking data points.

09:38:36 19 MS. LIGHTFOOT: Your Honor, that may be so, and we
09:38:38 20 are happy to --

09:38:40 21 JUDGE TINDER: Had you written them more narrowly --

09:38:42 22 MS. LIGHTFOOT: And we are happy to amend the
09:38:44 23 subpoena in that instance because --

09:38:46 24 JUDGE TINDER: How would you amend it? To limit it
09:38:50 25 to what you really say you're arguing for, give us the generic

09:38:54 1 description of what it is you feel you need that you can't get
09:38:56 2 from some other source without which your case will fail.

09:39:00 3 MS. LIGHTFOOT: We would like a piece of paper that
09:39:02 4 reflects the identity of the people who were actually
09:39:06 5 responsible for drawing either the entire map if it was one
09:39:10 6 person or the district. We would like --

09:39:12 7 JUDGE TINDER: I wonder why. Why does it matter who
09:39:18 8 drew it or who considered it? It's what the product was.

09:39:22 9 MS. LIGHTFOOT: Well, I think it does matter in the
09:39:22 10 instance --

09:39:24 11 JUDGE TINDER: Let's say Joe Jones did it and he is a
09:39:26 12 notorious discriminator. Is that what you are getting at?
09:39:30 13 Everybody knows that Joe Jones --

09:39:30 14 MS. LIGHTFOOT: No, I don't even think it's -- I
09:39:32 15 don't even think we're going in that direction. I think we
09:39:36 16 are entitled to know who it was that was responsible, i.e.,
09:39:38 17 was it somebody --

09:39:40 18 JUDGE TINDER: What it will demonstrate is that those
09:39:44 19 who were involved in the drawing have democratic affiliations.
09:39:48 20 I think we can probably take judicial notice of that.

09:39:50 21 MS. LIGHTFOOT: But I think we'd like to know,
09:39:52 22 whether, frankly, it was done by people in Springfield or
09:39:54 23 whether it was done by folks outside of Springfield, i.e., the
09:39:58 24 DCCC.

09:39:58 25 JUDGE LEFKOW: What does it matter?

09:40:00 1 MS. LIGHTFOOT: I think it matters, your Honor,
09:40:02 2 because it goes to several points that we're trying to
09:40:04 3 demonstrate in our claims: One, whether or not there was some
09:40:08 4 kind of partisan animus improperly so that was injected into
09:40:14 5 this process.

09:40:14 6 JUDGE TINDER: I am going to assume there is partisan
09:40:18 7 animus.

09:40:18 8 MS. LIGHTFOOT: But improper. I don't know how we
09:40:20 9 get at that other data knowing who the drawers of the map
09:40:24 10 were.

09:40:24 11 JUDGE LEFKOW: What could possibly be improper about
09:40:28 12 that? Most of the state houses are controlled by people --
09:40:32 13 the same party you represent. So that's the way politics
09:40:38 14 goes.

09:40:38 15 JUDGE TINDER: And then the measure, the test, is the
09:40:42 16 product, was it a fair product.

09:40:44 17 MS. LIGHTFOOT: For sure.

09:40:44 18 JUDGE TINDER: Regardless of who writes it.

09:40:46 19 MS. LIGHTFOOT: I think we'd like to have some
09:40:48 20 definitive -- a document that shows whether, in fact, any
09:40:50 21 expert actually was involved in opining about the map as
09:40:56 22 passed. We still don't know that definitively. All we know
09:41:00 23 is that --

09:41:00 24 JUDGE TINDER: Well, you do make a good point that to
09:41:04 25 the extent they resist your opponents and third parties resist

09:41:08 1 disclosing certain things, they can't then bring that witness
09:41:14 2 in to testify.

09:41:14 3 MS. LIGHTFOOT: I think that's right.

09:41:16 4 JUDGE TINDER: Kind of surprising you with it. I
09:41:18 5 understand that.

09:41:18 6 MS. LIGHTFOOT: And then beyond those two categories,
09:41:20 7 your Honor, what we'd like is essentially what was the data
09:41:24 8 that was used, was there any specific racial bloc voting
09:41:28 9 analysis that was done ahead of time to justify the way in
09:41:32 10 which the end product. That information I think we are
09:41:34 11 entitled to, and we still don't have that.

09:41:36 12 Now, one response might be, well, for example -- and
09:41:40 13 this is an issue that we want to talk to the court about -- we
09:41:44 14 are going to get expert reports from the other side relatively
09:41:46 15 soon. We have no idea if it's one expert report or multiple,
09:41:50 16 but let's assume that it's expert reports that analyze the map
09:41:56 17 as passed. Certainly, I think that will be helpful, but I
09:42:00 18 think we are also entitled to know whether or not any of those
09:42:04 19 experts or some other experts were engaged to analyze anything
09:42:10 20 about that map before it was passed, and we still don't know
09:42:12 21 that.

09:42:14 22 JUDGE TINDER: Well, now, you're confusing me again.

09:42:16 23 MS. LIGHTFOOT: Sorry.

09:42:18 24 JUDGE TINDER: The test here is not were there other
09:42:20 25 maps that might be better. It's whether this map

09:42:22 1 discriminates.

09:42:24 2 MS. LIGHTFOOT: And I apologize if I'm confusing you,
09:42:28 3 your Honor, and I agree with you, that is the test, it's
09:42:32 4 whether it's this particular map.

09:42:34 5 What we are interested in knowing, however, is
09:42:34 6 whether or not there was expert involvement in helping craft
09:42:36 7 that map on the front end before it was passed or whether or
09:42:40 8 not the expert analysis was done in an ad hoc basis after the
09:42:44 9 fact.

09:42:44 10 Now, we will learn some of that when we sit down with
09:42:46 11 the expert reports that are produced, we will learn some of
09:42:48 12 that when we have the opportunity, presumably, to depose those
09:42:52 13 experts, but there's still going to be a piece of information
09:42:54 14 that's missing.

09:42:56 15 The defendant in our case is the State Board of
09:42:58 16 Elections. We know now, based upon the discovery that they
09:43:00 17 provided to us, that they effectively didn't get involved in
09:43:04 18 any of this process until after the map was passed.

09:43:06 19 What we're interested in is what the data inputs were
09:43:10 20 that went into the drafting of this map. And if the experts
09:43:14 21 were only retained post the passage of the map, we are not
09:43:18 22 going to know that information because they are not going to
09:43:20 23 know it, frankly.

09:43:22 24 JUDGE LEFKOW: I still don't really see why that
09:43:24 25 matters; that is, if they had the good luck of producing a

09:43:28 1 valid map without engaging an expert, then that's good for
09:43:36 2 them, right?

09:43:36 3 MS. LIGHTFOOT: Well, I think it speaks to whether or
09:43:40 4 not, in fact, this map was valid. It would be -- it would
09:43:44 5 certainly be good luck, maybe even more than that, if they
09:43:48 6 produced this map without having a single expert weigh in on
09:43:52 7 the map before it was passed, and that would be an interesting
09:43:56 8 data point, frankly.

09:43:58 9 But I think what we are looking for is the basic
09:44:02 10 inputs into that map. That information is not readily
09:44:06 11 available in another source. We do think if you look at very
09:44:10 12 established case law that talks -- speaks to the issue of
09:44:14 13 balancing the qualified privilege in an evidentiary context,
09:44:20 14 that the balancing weighs in favor of disclosure of the very
09:44:24 15 information that we are seeking, and we'd ask the court to so
09:44:28 16 rule.

09:44:30 17 On a related point, if the court were to determine --
09:44:32 18 and we put this in as an alternative with respect to our
09:44:34 19 argument -- if the court were to determine either that there
09:44:38 20 is absolute immunity -- and I really don't believe that that's
09:44:42 21 a test, and, frankly, as a citizen of the state, I would
09:44:44 22 encourage the court not to adopt that because I think it would
09:44:48 23 make it virtually impossible for any plaintiff seeking to
09:44:52 24 vindicate an important federal right like the Voting Rights
09:44:56 25 Act to be able to come into court and prosecute their case. I

1 think the better test is qualified privilege. If the court
2 were to determine that the information is shielded from
3 some -- from view for some reason, what we would ask is that
4 part of that order, the court indicate that the State Board of
5 Elections, or no other party, frankly, can then come back and
6 use that information as a shield -- or, sorry, as a sword in
7 this case. I don't think they can have it both ways. If they
8 are saying, We can legislate in a black box, you are not
9 entitled to any information, fair enough, and if that's what
10 the court determines, we will respect that determination. But
11 I don't think on the back end, it's appropriate for them to
12 say, Wait, wait, wait, but, but, but let us bring in this
13 staffer, this piece of evidence, this expert.

14 Thank you, your Honor.

15 MR. PRENDERGAST: May I respond to that one point? I
16 just think it's a little early for motions in limine.

17 JUDGE LEFKOW: Pardon me?

18 MR. PRENDERGAST: I think it's a little early for
19 motions in limine.

20 JUDGE LEFKOW: All right. I think we have heard
21 enough. Thank you all for your help today.

22 MS. LIGHTFOOT: Thank you, your Honor.

23 MR. BERGETZ: Your Honor, Carl Bergetz for the
24 defendant. We do have one -- the parties to the case have
25 come to an agreement on a few things. There was one thing

09:46:24 1 that was pending before the court, a motion for a protective
09:46:28 2 order, and then there were some dates that we needed to move
09:46:30 3 out. And the clerk expressed that we should orally state them
09:46:32 4 to the court for purposes of entry of a minute order.

09:46:36 5 We have an agreement to extend fact depositions to
09:46:38 6 October 19th, currently set for October 5th, but we had an
09:46:44 7 agreement to extend it to the 19th.

09:46:44 8 MS. LIGHTFOOT: Correct, your Honor.

09:46:46 9 MR. BERGETZ: We have an agreement that the
09:46:48 10 defendants will have until October 4th to disclose experts.
09:46:52 11 Currently, the date is ended today, but we have an agreement
09:46:54 12 that that will be the 4th.

09:46:56 13 MS. LIGHTFOOT: That's correct, your Honor.

09:46:58 14 MR. BERGETZ: They will have 14 days thereafter to
09:47:00 15 produce any rebuttal expert reports.

09:47:02 16 And then we also have while fact depositions would
09:47:06 17 conclude on the 19th of October, we have an agreement that
09:47:10 18 expert depositions might spill over into the 24th -- the week
09:47:18 19 of the 23rd, I believe.

09:47:20 20 None of this would affect the end dates that your
09:47:22 21 Honors have set for purposes of the hearing or for pretrial
09:47:26 22 disclosures.

09:47:26 23 MS. LIGHTFOOT: That's correct.

09:47:28 24 One other housekeeping matter. You will recall we
09:47:30 25 filed a motion for protective order with respect to Rule

09:47:36 1 30(b)(6) following the last appearance in court.

09:47:38 2 We spoke together, and I think we have resolved all
09:47:40 3 of the issues, and we would be withdrawing -- moving to
09:47:42 4 withdraw our motion for protective order without prejudice.

09:47:46 5 JUDGE LEFKOW: All right. Very good.

09:47:50 6 MR. BERGETZ: Thank you, your Honor.

09:47:50 7 MS. LIGHTFOOT: Thank you, your Honor.

8 (Which were all the proceedings had in the above-entitled
9 cause on the day and date aforesaid.)

10 I certify that the foregoing is a correct transcript from
11 the record of proceedings in the above-entitled matter.

12 Carolyn R. Cox
13 Official Court Reporter
14 Northern District of Illinois

Date

14 /s/Carolyn R. Cox, CSR, RPR, CRR, FCRR

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